

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

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State Water Resources Control Board

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

Table of Contents

I. POLLUTION PREVENTION PLANS (SECTION 13263.3)	1
1. Q. What is a pollution prevention plan (PPP)?.....	1
2. Q. Are all discharges, including those subject to NPDES permits and non-NPDES waste discharge requirements, subject to the PPP provisions of section 13263.3?	1
3. Q. Is the requirement to prepare a PPP mandatory?	1
4. Q. What is a “chronic violator” for purposes of requiring a PPP?	1
5. Q. How will the State or Regional Board or a POTW determine if a discharger significantly contributes, or has the potential to significantly contribute, to the creation of a toxic hotspot?.....	2
6. Q. How does the State Board, a Regional Board, or a POTW determine that pollution prevention is necessary to achieve a water quality objective as stated in section 13263.3(d)(1)(C)?	2
7. Q. What information is required to be included in a PPP?.....	2
8. Q. Is there a special format to be used in preparing a PPP?	3
9. Q. What process is required by section 13263.3 for the State Board, the Regional Boards, and the POTWs when requiring preparation or implementation of, or compliance with, a PPP?	3
10. Q. Is the PPP considered a part of the NPDES permit?	3
11. Q. What enforcement actions can be taken against the discharger for failure to prepare or implement a PPP?.....	4
12. Q. Is the discharger still subject to enforcement actions for violations of its NPDES permit or pretreatment requirements even if it has implemented a PPP?.....	4
13. Q. May a discharger change its PPP?	4
14. Q. Must the State Board, a Regional Board, or a POTW approve a PPP?.....	4
15. Q. If a Regional Board has previously required a discharger to follow a pollution prevention program, is such a program preempted by section 13263.3 concerning PPPs?.....	4
16. Q. Does section 13263.3 affect the requirement to prepare storm water pollution prevention plans (SWPPPs) required by storm water NPDES permits?.....	5
17. Q. May a Regional Board or a POTW require a federal agency to prepare a pollution prevention plan?	5
18. Q. Does section 13385(h)(1), which allows the State or Regional Board to require preparation of a PPP in lieu of paying a mandatory minimum penalty, provide an additional basis for requiring a PPP, or must the Regional Board find that one of the conditions for requiring a PPP in section 13263.3(d) has been met?.....	5

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

II. MANDATORY MINIMUM PENALTIES (SECTION 13385(H)-(K)) ...6

A. *Types of Discharges and Violations That Are Subject to Mandatory Penalties*6

- 19. Q. Are all discharges, including those subject to NPDES permits and non-NPDES waste discharge requirements, subject to the mandatory penalty? 6
- 20. Q. Are all violations of an NPDES permit subject to a mandatory minimum penalty? 6
- 21. Q. What is an effluent limitation? What does it mean to “exceed” an effluent limitation? 6
- 22. Q. If an NPDES permit authorizes discharges to storage ponds, are such discharges to the ponds subject to mandatory penalties? 8
- 23. Q. Are spills and overflows subject to mandatory minimum penalties under section 13385(h) or (i)? 8
- 24. Q. Section 13385(h) requires the State or Regional Board to assess a mandatory penalty of \$3,000 for each “serious violation.” How is “serious violation” defined? 8
- 25. Q. Is coliform a Group I or Group II pollutant?..... 9
- 26. Q. What types of violations are subject to section 13385(i)? 9
- 27. Q. What constitutes a failure to file a report or the filing of an incomplete report pursuant to section 13260 for purposes of determining violations subject to section 13385(i)(2) or (3)? 9
- 28. Q. What is a “toxicity discharge limitation” for the purposes of section 13385(i)(4)? What is a “toxic pollutant” for the purposes of section 13385(i)(4)? 10
- 29. Q. Are "minor violations" under section 13399 subject to mandatory penalties? 10
- 30. Q. How does the State or Regional Board determine whether there is a serious violation under section 13385(h) if the effluent limitation is a narrative effluent limitation? 10
- 31. Q. How does the State or Regional Board determine whether there is a violation under section 13385(h) or (i) if the effluent limitation is lower than the detection level? 11
- 32. Q. How does the State or Regional Board determine whether there is a violation under section 13385(h) or (i) if the effluent limitation is zero or nondetectable? 11

B. *Calculating the Amount of the Mandatory Penalty*11

- 33. Q. Section 13385(h) and (i) mandate a penalty if specified violations occur during “any period of six consecutive months.” How is the six consecutive month period determined? 11
- 34. Q. How is the amount of mandatory penalty calculated for violations subject to section 13385(i)? 12

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

35. Q. Should the State or Regional Board consider that a violation occurs each day beginning on the date of sampling until receipt of the sampling results?	13
36. Q. If there is a single operational upset that results in simultaneous exceedances of more than one effluent limitation, should the State or Regional Board consider that one violation or multiple violations?	13
37. Q. If the waste discharge requirements contain effluent limitations addressing both a daily maximum and a monthly average for the same pollutant, are exceedances of each based on the same monitoring event(s) counted as two separate violations for purposes of section 13385(h) or (i)?	15
38. Q. In determining the number of violations for purposes of section 13385(h) or (i), should the State or Regional Board count one violation for each separate limitation regardless of the number of violations?	15
39. Q. How does the State or Regional Board determine how many “violations” occurred?	15
40. Q. Does an exceedance of an average or median effluent limitation constitute one violation or multiple violations?	15
41. Q. Is it possible to have more than one mandatory penalty per day for an exceedance of a single effluent limitation?	16
C. Potential Exceptions to Mandatory Penalties	16
42. Q. Do the mandatory minimum penalty provisions apply even if the Regional Board has issued a cease and desist order or other order providing a time schedule for achieving compliance with the effluent limitation that is the subject of the violations?	16
43. Q. Are exceedances of effluent limitations that result from qualifying treatment plant bypasses or upsets subject to mandatory penalties?	16
44. Q. Are there any exceptions to the requirement to assess mandatory penalties due to circumstances that are beyond the control of the discharger?	17
45. Q. What additional exceptions to mandatory penalties took effect on January 1, 2001?	17
46. Q. What are the conditions for qualifying for the new exception to mandatory penalties based on compliance with an existing cease and desist order or time schedule order pursuant to section 13385(j)(2)?	17
47. Q. What are the conditions for qualifying for the new exception to mandatory penalties based on compliance with a new cease and desist order or time schedule order pursuant to section 13385(j)(3)?	18
48. Q. Do the exceptions to mandatory penalties based on compliance with a CDO or TSO apply to violations that occurred prior to January 1, 2001?	19
49. Q. What are the conditions for the “small community” alternative to mandatory penalties?	20

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

50. Q. Which dischargers are eligible for the small community alternative to mandatory penalties? What is a “compliance project”?	20
51. Q. May the State and Regional Boards utilize the small community alternative to mandatory penalties for violations that occurred prior to January 1, 2001?	20
52. Q. How often can a discharger perform a supplemental environmental project or develop a pollution prevention plan in lieu of paying a mandatory penalty?	21
53. Q. Are federal agencies that have NPDES permits subject to mandatory minimum penalties?	21
D. Procedures Related to the Assessment of Mandatory Penalties.....	22
54. Q. Does the State or Regional Board assess mandatory minimum penalties?	22
55. Q. Who has the burden of proof, the State or Regional Board or the discharger, in determining whether the violation is subject to the mandatory minimum penalty?	22
56. Q. What procedure should the Regional Board use in assessing the mandatory minimum penalty?	22
57. Q. Can persons aggrieved by the assessment of mandatory penalties file a petition for review with the State Board under section 13320? If so, does the discharger have to pay the penalty while the petition is pending before the State Board?	23
58. Q. Must the Regional Board recover economic benefit in assessing a penalty under section 13385(h) or (i)?	23
59. Q. May the Regional Board assess administrative civil liability in addition to the mandatory penalty?	23
60. Q. Does the assessment of a mandatory penalty preclude later assessment of administrative civil liability pursuant to section 13385(a) through (e) for the same violation that was the subject of the mandatory penalty?	24
III. ECONOMIC BENEFIT (SECTION 13385(E))	25
61. Q. Section 13385(e) now requires the Regional Board, State Board, or superior court, in determining the amount of civil liability for violations of an NPDES permit to, at a minimum, recover the economic benefits, if any, derived from the acts that constitute the violation. How is the economic benefit to be calculated?	25
62. Q. Must the Regional Board assess the economic benefit to the extent it exceeds statutory maximum liability (i.e., the maximum \$10,000 per day per violation and \$10 per gallon)?	25
63. Q. If the Regional Board must assess a mandatory penalty under section 13385(h) or (i), but has determined that it is not appropriate to assess administrative civil liability, must the Regional Board also recover any economic benefit derived from the acts that constitute the violation(s)?	25

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

64. Q. In determining the economic benefit, may the Regional Board subtract from the economic benefit the amount the discharger spent in responding to the discharge that occurred as a result of the failure to take the action in advance that would have prevented the discharge?	25
IV. EFFLUENT LIMITATIONS (SECTION 13263.6).....	26
65. Q. Section 13263.6 requires the Regional Boards to include effluent limitations in waste discharge requirements for a POTW for all substances (1) that are reported in toxic chemical release data reports prepared pursuant to section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. section 11023), (2) that are indicated are discharged into the POTW, and (3) for which the State or Regional Board has established numeric water quality objectives, and where (4) the Regional Board determines that the discharge is or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to, an excursion above any numeric water quality objective. How does the new section 13263.6(a), which requires the Regional Board to include effluent limitations in certain situations, differ from existing federal NPDES regulations that require inclusion of numeric effluent limitations in NPDES permits under certain circumstances?	26
66. Q. What is section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. Sec. 11023)?	27
67. Q. How does the Regional Board determine which substances are included in the most recent toxic chemical release data reported pursuant to section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. Sec. 11023)?	27
68. Q. Does section 13263.6 apply to non-NPDES waste discharge requirements?.....	27

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

I. POLLUTION PREVENTION PLANS (SECTION 13263.3¹)

1. Q. What is a pollution prevention plan (PPP)?

- A. A PPP is a plan specifically defined in section 13263.3 that identifies actions that would cause a net reduction in the use or generation of a hazardous substance or pollutant that is discharged into water.

2. Q. Are all discharges, including those subject to NPDES permits² and non-NPDES waste discharge requirements, subject to the PPP provisions of section 13263.3?

- A. No. The pollution prevention provisions apply only to dischargers subject to NPDES permits and to industrial users that discharge to publicly owned treatment works (POTWs), i.e., subject to the federal pretreatment program. They do not apply to non-NPDES waste discharges. Section 13263.3(c). The State and Regional Boards and POTWs may require PPPs of industrial users. The State and Regional Boards may require PPPs of POTWs. While section 13263.3 only applies to dischargers subject to NPDES permits, Regional Boards may require other dischargers to submit similar reports addressing pollution prevention pursuant to section 13267. Regional Boards may also require dischargers subject to NPDES permits to submit similar reports where the conditions in section 13263.3 are not met, pursuant to section 13267 or section 13383.

3. Q. Is the requirement to prepare a PPP mandatory?

- A. No. The State Board, a Regional Board, or a POTW has discretion to require the discharger to prepare a PPP in the circumstances listed in section 13263.3(d), including where the discharge is a chronic violator, where the discharger significantly contributes to or has the potential to significantly contribute to creation of a toxic hot spot, where pollution prevention is necessary to achieve a water quality objective, or where the discharger is subject to a cease and desist order or a time schedule order issued pursuant to sections 13300, 13301, or 13308.

4. Q. What is a “chronic violator” for purposes of requiring a PPP?

- A. The State Board describes the term “chronic violator” and “chronic violation” in the Guidance to Implement the Water Quality Enforcement Policy. [Note: the Enforcement Policy is currently scheduled for significant revisions. This portion of the Q&A will be revised to be consistent with any final revisions.] For major NPDES permittees, as defined by U.S. EPA in 40 CFR Section 122.2 (July 1, 1994), the enforcement criterion for chronic violations is exceedance of the monthly average effluent limit for any pollutant

¹ All statutory references are to the California Water Code, unless specified otherwise.

² The State and Regional Boards issue waste discharge requirements, which also serve as NPDES permits, pursuant to section 13377. For the reader’s convenience, this type of waste discharge requirements will be referred to as an NPDES permit.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

in any four months in a six-month period, or exceedance of the monthly average effluent limitation for any pollutant in the same season for two years in a row. For purposes of section 13263.3, the term “chronic violator” would apply to all dischargers subject to section 13263.3, not just to major NPDES permittees. In other words, if a discharger subject to section 13263.3 exceeds a monthly average effluent limit for any pollutant in any four months in a six-month period or exceeds the monthly average effluent limitation for any pollutant in the same season for two years in a row, it would be considered a “chronic violator.”

5. Q. How will the State or Regional Board or a POTW determine if a discharger significantly contributes, or has the potential to significantly contribute, to the creation of a toxic hotspot?

- A. The State Board adopted Resolution 99-065, a Water Quality Control Policy that sets forth the Consolidated Toxic Hot Spots Cleanup Plan. The Plan provides guidance to the Regional Boards for implementing the requirements of section 13390 et seq. (Chapter 5.6. Bay Protection and Toxic Cleanup.) The Plan provides guidance for the Regional Boards in determining whether discharges contribute or potentially contribute to the creation and maintenance of a toxic hotspot. In determining whether it is appropriate to require preparation of a PPP, the Regional Boards should consider the Consolidated Toxic Hot Spots Cleanup Plan.

6. Q. How does the State Board, a Regional Board, or a POTW determine that pollution prevention is necessary to achieve a water quality objective as stated in section 13263.3(d)(1)(C)?

- A. The provision provides considerable discretion to the State and Regional Boards and POTWs in making the determination that pollution prevention is necessary to achieve a water quality objective. Some examples could include where an industrial user contributes significant pollutant loading to a POTW that may be causing a POTW to exceed a water quality objective, where the discharge is to a Clean Water Act section 303(d) listed water body, where an industrial user is preparing a pretreatment plan, or where a pollutant discharge is causing an upset at the POTW.

7. Q. What information is required to be included in a PPP?

- A. The State Board or a Regional Board may require a POTW to prepare a PPP and the State Board, a Regional Board, or a POTW may require a discharger other than a POTW to prepare a PPP. The PPP requirements for POTWs are different than the PPP requirements for other dischargers. A PPP prepared by a POTW must address all of the issues specified in section 13263.3(d)(3). A PPP prepared by a discharger other than a POTW must address all of the issues specified in section 13263.3(d)(2).

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

8. Q. Is there a special format to be used in preparing a PPP?

- A. A sample format is available, but other formats may be used. The State Board was required to adopt a sample format, and provide it to dischargers for completing the PPP. The State Board has adopted the sample format. It is available on the State Board's website at www.swrcb.ca.gov. The use of the sample format is not required; it is just available to assist dischargers in preparing PPPs. Dischargers may choose their own format so long as they address all the issues required under section 13263.3 and any additional issues required to be addressed by the regulatory agency.

9. Q. What process is required by section 13263.3 for the State Board, the Regional Boards, and the POTWs when requiring preparation or implementation of, or compliance with, a PPP?

- A. Section 13263.3(d) authorizes the State or Regional Board or POTW to require a discharger to complete and implement a PPP. The Regional Board may implement this authority by making the preparation of a complete PPP a requirement of the NPDES permit, a 13267 order, or one of the following enforcement orders. The Regional Board may require the implementation of the PPP by issuing an order pursuant to sections 13263.3(d)(1), 13300, 13301, 13304, or 13308. The Regional Board may also require the development of a PPP in lieu of a mandatory penalty for a serious violation pursuant to section 13385(h). A POTW would use its enforcement authority granted under section 13263.3 and its existing pretreatment authority to require preparation and implementation of a PPP. The State Board's Office of Chief Counsel has prepared sample permits and orders.

After the discharger prepares the PPP, the State Board, Regional Board, or POTW must make the PPP available for public review. Trade secret information is exempt from public disclosure and shall be included in a separate appendix not available to the public. The PPP, except for the trade secret information, is a public record that must be provided to the public upon request, following the normal procedure for providing public records. Section 13263.3(e) requires the State Board, a Regional Board, or a POTW to provide an opportunity for public comment prior to requiring the discharger to comply with a PPP developed by the discharger. The State Board, a Regional Board, or the POTW may provide that opportunity for comment by holding a public meeting or hearing and/or by providing the public an opportunity to submit comments in writing.

10. Q. Is the PPP considered a part of the NPDES permit?

- A. Section 13263.3(k) states that the "state board, a regional board, or POTW may not include a pollution prevention plan in any waste discharge requirements or other permit issued by that agency." In other words, the Regional Board may not incorporate by reference the contents of a PPP into an NPDES permit, require the implementation of a PPP in an NPDES permit, or otherwise include a PPP in an NPDES permit, but it may make preparation of a PPP a condition of an NPDES permit.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

11. Q. What enforcement actions can be taken against the discharger for failure to prepare or implement a PPP?

- A. Pursuant to section 13263.3(g), the State Board and the Regional Boards may assess administrative civil liability pursuant to section 13385(c)(1) for failure to complete a PPP, for submitting an inadequate PPP, or for not implementing a PPP, unless a POTW has assessed penalties for the same action. Failure to prepare or implement a PPP is not subject to the mandatory minimum penalty provisions. The Regional Boards should assess liability under section 13263.3(g) in the same way that Regional Boards assess administrative civil liability for other violations of NPDES permits. Alternatively, Regional Boards may assess liability under sections 13268 or 13350 for violating orders issued pursuant to sections 13267 or 13304 that required preparation of a PPP. POTWs may assess civil penalties against the dischargers as specified in section 13263.3(h) or other local legal authority, such as a pretreatment ordinance.

12. Q. Is the discharger still subject to enforcement actions for violations of its NPDES permit or pretreatment requirements even if it has implemented a PPP?

- A. Yes. The PPP does not take the place of the NPDES permit requirements. The discharger must continue to comply with its NPDES permit even if it is required to prepare and implement a PPP and regardless of the effectiveness of the PPP.

13. Q. May a discharger change its PPP?

- A. Yes. A discharger may change its PPP, including withdrawing from a measure included in the PPP for several reasons specified in section 13263.3(i), if approved by the State Board, a Regional Board, or a POTW.

14. Q. Must the State Board, a Regional Board, or a POTW approve a PPP?

- A. No. The State Board, the Regional Board, or the POTW may require preparation of a PPP, but is not required to approve the PPP or assure that it will in fact reduce pollution.

15. Q. If a Regional Board has previously required a discharger to follow a pollution prevention program, is such a program preempted by section 13263.3 concerning PPPs?

- A. No. The Regional Board has authority pursuant to section 13267 to require dischargers to prepare reports and may require other actions to comply with water quality standards. The new provisions do not preclude the Regional Boards from requiring dischargers to prepare technical reports under section 13267 that may include a report similar to a PPP as defined in section 13263.3.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

16. Q. Does section 13263.3 affect the requirement to prepare storm water pollution prevention plans (SWPPPs) required by storm water NPDES permits?

- A. No. section 13263.3 addresses preparation of a specific type of PPP and only specifies what must be addressed in that type of PPP. It does not preempt or preclude the requirement to prepare SWPPPs pursuant to individual or general NPDES storm water permits.

17. Q. May a Regional Board or a POTW require a federal agency to prepare a pollution prevention plan?

- A. Yes. Clean Water Act section 313 waived sovereign immunity with respect to state water pollution laws. Section 313 requires the federal government to comply with state requirements, administrative authority, process, and sanctions. The requirement to prepare a pollution prevention plan would be considered within the administrative authority of the state.

18. Q. Does section 13385(h)(1), which allows the State or Regional Board to require preparation of a PPP in lieu of paying a mandatory minimum penalty, provide an additional basis for requiring a PPP, or must the Regional Board find that one of the conditions for requiring a PPP in section 13263.3(d) has been met?

- A. Section 13385(h)(1) does not provide an additional basis for requiring a PPP. Prior to requiring a discharger to develop a PPP in lieu of a mandatory penalty under section 13385(h)(1), the Regional Board must find that one of the conditions in section 13263.3(d) has been met.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

II. MANDATORY MINIMUM PENALTIES³ (SECTION 13385(H)-(K))

A. Types of Discharges and Violations That Are Subject to Mandatory Penalties

19. Q. Are all discharges, including those subject to NPDES permits and non-NPDES waste discharge requirements, subject to the mandatory penalty?

A. No. The mandatory penalty provisions were added to section 13385, which applies only to surface water discharges subject to the NPDES requirements, including both individual NPDES permits and general NPDES permits such as storm water permits. Any unpermitted discharge that should be subject to an NPDES permit would generally not be subject to mandatory penalties but would instead be subject to administrative civil liability under section 13385(a).

20. Q. Are all violations of an NPDES permit subject to a mandatory minimum penalty?

A. No. Section 13385(h) and (i) specify the types of violations that are subject to mandatory penalties. If a discharger causes one of these types of violations, unless otherwise specified in section 13385(h) through (k), the penalty is mandatory and must be assessed by the State or Regional Boards.

21. Q. What is an effluent limitation? What does it mean to “exceed” an effluent limitation?

A. The federal regulatory definition of the term “effluent limitation” is “any restriction . . . on quantities, discharge rates, and concentrations of pollutants which are discharged from point sources into waters of the United States, the waters of the contiguous zone, or the ocean.” 40 CFR 122.2. This definition has been interpreted by the U.S. EPA and the courts very broadly in some contexts. For example, the U.S. EPA considers design standards and best management practices for storm water and concentrated animal feeding operations to be effluent limitations. 61 Fed.Reg. 57425, 57427 (Nov. 6, 1996); 66 Fed.Reg. 2960, 3053 (Jan. 12, 2001). The regulation authorizing municipalities to apply for variances from the secondary treatment requirements has been held to be an effluent limitation. *NRDC v. EPA*, 665 F.2d 768, 776 (D.C. Cir. 1981). Under this approach, virtually any limitation contained in an NPDES permit could be considered an “effluent limitation.”

In adopting the mandatory penalty provisions, however, it is the Office of Chief Counsel’s opinion that the Legislature intended a more restrictive use of the term “effluent limitation.” In another section of Senate Bill 709, the Legislature added section 13263.6, which requires the Regional Boards to prescribe effluent limitations under specified circumstances. (See Section IV. of this document for a discussion of this requirement.)

³ For the purposes of these Questions and Answers, the mandatory minimum penalty provisions (sections 13385(h)-(k)) will be referred to as “mandatory penalty” provisions, and the administrative civil liability provisions (sections 13385(a)-(e)) will be referred to as “discretionary liability” or “liability” provisions.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

The Legislature used the term “effluent limitations” in section 13263.6 in a manner that loosely parallels the requirements for water quality-based effluent limitations contained in 40 CFR 122.44(d)(1). In addition, in section 13385(a)(2), the Legislature made every violation of an NPDES permit subject to discretionary liability. The Legislature clearly intended, therefore, that the mandatory penalty provisions that apply to “effluent limitations” apply only to a subset of NPDES permit limitations.

For the purposes of applying the mandatory penalty provisions, the Regional Boards should consider “effluent limitations” to refer to the restrictions that focus on the quantities, discharge rates, or concentrations of the effluent that is authorized to be discharged from the location(s) specified in the NPDES permit.⁴ An effluent limitation may be expressed in numeric or narrative form, and may be expressed as a prohibition against a discharge of a certain quantity, rate, or concentration of effluent from the discharge location. Limitations that merely specify design standards, management practices, or operational requirements would not be considered effluent limitations. In addition, limitations that focus on the quality of the receiving water (generally referred to as “receiving water limitations”), rather than the quantity or quality of the effluent, would not be considered effluent limitations for these purposes. This approach is consistent with the Regional Boards’ traditional manner of drafting NPDES permits, in which water quality objectives are incorporated into NPDES permits as receiving water limitations, regardless of whether an effluent limitation is required by the federal regulations. For administrative convenience, NPDES permits often contain headings to separate the different types of permit conditions (e.g., “prohibitions,” “effluent limitations,” “receiving water limitations,” “general provisions,” etc.). The heading will be helpful, but not conclusive, in determining whether the limitation is an effluent limitation. The limitation must, in fact, be an effluent limitation in order for any exceedances to be subject to a mandatory minimum penalty.

Section 13385(h)(2) and (i)(1) refer to a discharge or person who “exceeds” an effluent limitation, and section 13385(i)(4) refers to a person who “exceeds” a toxicity discharge limitation. To “exceed” means to surpass or to go beyond the limit. American Heritage Dictionary, 4th ed. 2000. Limitations are most frequently expressed in terms of a maximum quantity, rate, or concentration. In those cases, if the amount discharged is greater than the limitation, the discharge has obviously exceeded the limitation. Occasionally, however, the limitation is expressed in terms of a minimum quantity, rate, or concentration. Examples include pH and dissolved oxygen. In these cases, if the discharge is lower than the minimum limitation, the discharge has also exceeded the limitation, because it has gone beyond the authorized limit.

⁴ “Effluent” refers to both the individual pollutants in the discharge and the sum of those pollutants, or the whole of the discharge.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

22. Q. If an NPDES permit authorizes discharges to storage ponds, are such discharges to the ponds subject to mandatory penalties?

- A. Some dischargers' NPDES permits authorize the use of storage ponds to store treated waste water, and authorize discharge of the stored effluent both to waters of the United States and to reclamation (e.g., for irrigation). Discharges to ponds that are not considered waters of the United States would not be subject to mandatory minimum penalties as long as the waste water is not subsequently discharged to waters of the United States. Any exceedances of the NPDES permit's effluent limitations would subject the discharge to mandatory penalties, however, if the waste water is subsequently discharged from the pond to surface water.

23. Q. Are spills and overflows subject to mandatory minimum penalties under section 13385(h) or (i)?

- A. If the spill or overflow does not occur from the authorized discharge location(s) specified in the NPDES permit, it is not subject to mandatory minimum penalties, because it is not subject to the permit's effluent limitations. If the spill or overflow is from an authorized discharge location, however, it would be subject to a mandatory minimum penalty if it exceeds the effluent limitations. The Regional Board should, therefore, evaluate the individual NPDES permit's terms to determine whether the spill or overflow is from an authorized discharge location, and if it is, whether it exceeded any effluent limitations. Spills and overflows from an authorized discharge location may be subject to the single operational upset provision in section 13385(f). (In such cases, violations of multiple effluent limitations would be considered a single violation, as discussed below in the Answer to Question 36.) Note that section 13385(h) and (i) are mandatory penalties, but the Regional Board may also assess discretionary liability for spills or overflows, whether or not they are subject to the mandatory penalties.

If a spill or overflow to surface waters occurs from a location that is not authorized in the NPDES permit (e.g., from the collection system), or from a facility that is not regulated by an NPDES permit, that discharge is subject to discretionary administrative civil liability under section 13385(a), but is not subject to mandatory penalties under section 13385(h) and (i).

24. Q. Section 13385(h) requires the State or Regional Board to assess a mandatory penalty of \$3,000 for each "serious violation." How is "serious violation" defined?

- A. Section 13385(h)(2)(A) defines a "serious violation" to mean any waste discharge that exceeds the effluent limitation contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or a Group I pollutant by 40 percent or more. Appendix A of Title 40, Code of Federal Regulations, section 123.45 specifies the Group I and II pollutants. 40 CFR 123.45 lists categories of Group I and Group II pollutants, each with a list that includes specific constituents and indicates that there are other, nonlisted, constituents that fit into some of the categories. U.S. EPA publishes a

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

more complete list of Group I and Group II pollutants that are covered under “other.” That list is available on the State Board’s website. In determining whether an effluent limitation is a Group I or Group II pollutant, the Regional Board should check the more complete list. The NPDES permit must include an effluent limitation for a Group I or II pollutant for the mandatory penalty to apply. Additional constituents that are not Group I or Group II pollutants may also be subject to effluent limitations. In such cases, exceedances of those effluent limitations would be addressed by section 13385(i)(1), not (h).

25. Q. Is coliform a Group I or Group II pollutant?

- A. Coliform is neither a Group I nor a Group II pollutant and, therefore, exceedances of coliform effluent limitations could not be considered “serious violations.”

26. Q. What types of violations are subject to section 13385(i)?

- A. Section 13385(i) requires the Regional Board to assess a mandatory minimum penalty of \$3,000 per violation, not counting the first three violations, if the discharger does any of the following four or more times in any period of six consecutive months: (1) exceeds a waste discharge requirement effluent limitation (numeric or narrative), (2) fails to file a report pursuant to section 13260, (3) files an incomplete report pursuant to section 13260, or (4) exceeds a toxicity discharge limitation where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

27. Q. What constitutes a failure to file a report or the filing of an incomplete report pursuant to section 13260 for purposes of determining violations subject to section 13385(i)(2) or (3)?

- A. Section 13385(i)(2) and (3) requires a mandatory penalty only where the discharger fails to file a report under section 13260 or files an incomplete report four or more times in any period of six consecutive months. Since NPDES dischargers are generally required to file a report of waste discharge under section 13260 only once every five years, it is unlikely that mandatory penalties would ever be imposed pursuant to section 13385(i)(2) or (3). It is conceivable, however, that a new discharger, or an existing discharger who has a material change in the discharge, could fail to file a report of waste discharge after receiving notice of the requirement four or more times in a period of six consecutive months from the Regional Board. It is also possible that after receiving a report of waste discharge, the Regional Board could find that it is incomplete four or more times in a period of six consecutive months because the discharger failed to provide needed information or the appropriate fees to complete the report. Note that failure to submit monitoring reports or submitting incomplete monitoring reports are not subject to mandatory penalties under section 13385(h) or (i).

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

28. Q. What is a “toxicity discharge limitation” for the purposes of section 13385(i)(4)? What is a “toxic pollutant” for the purposes of section 13385(i)(4)?

- A. A “toxicity discharge limitation” is a toxicity limitation that applies to the discharge, but that does not meet the definition of an effluent limitation. Exceedances of toxicity effluent limitations, including effluent limitations for whole effluent toxicity, are addressed by section 13385(i)(1). In addition, because the Legislature used the term “discharge” in describing this type of limitation, it appears that a “toxicity discharge limitation” would not include toxicity receiving water limitations. (See Answer to Question 21.) Some NPDES permits may have toxicity discharge limitations that may be exceeded, but that do not qualify as either effluent limitations or receiving water limitations. Section 13385(i)(4) requires the assessment of mandatory penalties if such a toxicity discharge limitation is exceeded four or more times in six consecutive months, but only if the permit does not have any pollutant-specific effluent limitations for toxic pollutants.

The term “toxic pollutant” is defined in the Clean Water Act section 502(13), 33 U.S.C. 1362(13). The U.S. EPA has promulgated a list of toxic pollutants found in 40 CFR Part 302. If the NPDES permit contains an effluent limitation for any toxic pollutant on U.S. EPA’s list, then mandatory penalties would not be assessed under section 13385(i)(4). Instead, penalties for exceeding any pollutant-specific effluent limitations would be assessed under section 13385(i)(1).

29. Q. Are “minor violations” under section 13399 subject to mandatory penalties?

- A. Section 13399 requires the Regional Boards to issue a “notice to comply” for violations that constitute “minor violations.” (Minor violations are described in the State Board’s Enforcement Policy.). Section 13399.2(e) states that the State or Regional Board may not take any other enforcement action under Division 7 of the Water Code against a person who has received a notice to comply and is in compliance. Section 13385(h) and (i) both state, however, that “notwithstanding any other provision of [Division 7]” the mandatory penalties apply. Therefore, even if a “minor violation” is subject to a notice to comply it also may be subject to mandatory penalties if the minor violation is also a violation of or results in a violation enumerated in section 13385(h) or (i).

30. Q. How does the State or Regional Board determine whether there is a serious violation under section 13385(h) if the effluent limitation is a narrative effluent limitation?

- A. Section 13385(h)(2)(A) defines a “serious violation” as a waste discharge that exceeds a Group II or Group I effluent limitation by either 20 percent or 40 percent, respectively. The term “effluent limitation” as used in section 13385(h) does not distinguish between numeric and narrative effluent limitations. Therefore, if the discharge exceeds a narrative effluent limitation by the requisite percentage, it is subject to section 13385(h). In the case of some narrative effluent limitations, however, mandatory penalties for serious violations may not be assessed because it is not quantitatively possible to determine whether the discharge has exceeded the narrative effluent limitation by 20 percent or 40 percent. [The

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

Enforcement Policy may be revised to provide additional guidance in this area, in which case this document will be revised accordingly.] In this case, the discharge could not be subject to section 13385(h). (Effluent limitations of “zero” or “nondetectable” are addressed below.) However, note that even if the violation is not subject to a mandatory penalty under section 13385(h), it may still be subject to discretionary administrative civil liability and/or a mandatory penalty under section 13385(i).

31. Q. How does the State or Regional Board determine whether there is a violation under section 13385(h) or (i) if the effluent limitation is lower than the detection level?

- A. A mandatory penalty should only be imposed where the State or Regional Board can document a measurable violation consistent with federal regulations and State Board plans or policies addressing detection limits. See, e.g., the State Board’s “Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California” (Resolution 2000-015, “State Implementation Plan”). An effluent limitation for a pollutant addressed by the State Implementation Plan would be considered exceeded if the concentration of the pollutant in the monitoring sample is greater than the effluent limitation and greater than or equal to the reported Minimum Level.

32. Q. How does the State or Regional Board determine whether there is a violation under section 13385(h) or (i) if the effluent limitation is zero or nondetectable?

- A. If the effluent limitation is “zero,” any reported detection necessarily exceeds the effluent limitation by more than 40 percent. [This is in accordance with the current draft of the revisions to the State Board’s Enforcement Policy] Ideally, where the NPDES permit contains an effluent limitation of “nondetectable,” the permit specifies the detection limit or methodology to be used for determining compliance with the effluent limitation. In such cases, that detection limit or methodology, including any authorized approach for rounding to significant figures, should be used for determining compliance. Where the permit does not specify the detection limit or methodology, the Regional Board should amend the permit or provide other direction to the discharger concerning the detection limit (e.g., pursuant to section 13267). Where there is no such direction, the Regional Board should determine what detection limit or methodology has traditionally been used by the discharger. That detection limit or methodology should be the basis for determining compliance with the “nondetectable” permit effluent limitations.

B. Calculating the Amount of the Mandatory Penalty

33. Q. Section 13385(h) and (i) mandate a penalty if specified violations occur during “any period of six consecutive months.” How is the six consecutive month period determined?

- A. SB 709 became effective on January 1, 2000. Violations that occurred prior to that date are not subject to the mandatory penalties. The act required the Regional Board to assess a mandatory penalty for each serious violation in any six-month period (former section

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

13385(h)(1) and (i)(1)), and for the fourth and subsequent violations if there were four or more specified violations in any six-month period (former section 13385(i)(2)). SB 2165, which became effective on January 1, 2001, restated these provisions and added a clarifying definition of a “period of six consecutive months” in order to facilitate the necessary calculations (because the months have differing numbers of days). The period is now defined as the 180 days immediately following the first violation. Because this merely ratifies the period that the State and Regional Boards have been using, this definition is not considered to be a substantive change in the law. The application of the new definition in calculating whether there have been four or more violations in a period of six consecutive months for the purposes of section 13385(i) is potentially ambiguous, because it could be argued that there must be an initial violation before the Regional Board can begin to calculate whether there have been four additional violations during the subsequent 180-day period. It would follow that the requirement to assess a mandatory penalty does not apply until the fifth violation in a period of 181 days. This hypertechnical interpretation would conflict with the plain meaning of section 13385(i): “a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following [violations] four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations” Further, there is nothing in the legislative history for SB 2165 that indicates that the Legislature intended to change this fundamental provision of SB 709. Therefore, the Regional Boards must assess mandatory minimum penalties under section 13385(i) for the fourth and any subsequent violations that occur within the 180-day period that immediately follows the first violation.

34. Q. How is the amount of mandatory penalty calculated for violations subject to section 13385(i)?

- A. In determining the amount of the penalty under section 13385(i), the Regional Board would assess \$3,000 for each violation, not counting the first three violations, where the discharger had four or more violations in any one of the four categories of violations in section 13385(i). For example, if a discharger exceeded any combination of effluent limitations 10 times in a period of six consecutive months and a toxicity discharge limitation four times in that same six-month period, the penalty would be \$24,000 (\$21,000 for the seven violations in excess of the first three violations for the effluent limitation and \$3,000 for the one violation in excess of the first three violations for the toxicity discharge limitation). If the same discharger filed one incomplete report under section 13260 during the same six-month period, that violation would not be subject to a mandatory penalty because that type of violation did not occur four or more times in the six-month period. A mandatory penalty is not assessed unless a discharger causes four or more violations within one category of section 13385(i). Note that serious violations under section 13385(h) also count toward determining the number of exceedances under section 13385(i)(1) because serious violations are, by definition, also violations of effluent limitations. An additional mandatory penalty would not be assessed for the serious

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

violations under section 13385(i), however, because a mandatory penalty would already be required under section 13385(h).

Section 13385(i) provides that the requirement to assess a mandatory penalty does not apply to the first three violations in a period of six consecutive months, but the statute does not provide any direction for determining which violation(s) occurred first where there are both serious violations and nonserious violations on the same day. In this situation, the total amount of the penalty may vary depending on whether the serious violation is counted before or after the nonserious violation. If a nonserious violation is counted as one of the first three violations it will not receive a mandatory penalty, but a serious violation will always receive a mandatory penalty whether or not it is one of the first three violations. Therefore, when it is not possible to determine the order in which the violations occurred, the recommended conservative approach is to count the serious violations last in determining the order in which multiple violations on the same day occurred.

Attached to this Q&A are several examples for calculating the amount of mandatory minimum penalties.

35. Q. Should the State or Regional Board consider that a violation occurs each day beginning on the date of sampling until receipt of the sampling results?

- A. Typically, sampling data would only indicate whether there is a violation on the date the data is collected. Other evidence, however, may be used to demonstrate that violations occurred on more than one day.

36. Q. If there is a single operational upset that results in simultaneous exceedances of more than one effluent limitation, should the State or Regional Board consider that one violation or multiple violations?

- A. Section 13385(f) states that a single operational upset that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation. Section 13385(f) applies to determining penalties under section 13385(h) and (i). Therefore, for purposes of section 13385(h) and (i), simultaneous exceedances of more than one effluent limitation due to a single operational upset would be considered one violation. Section 13385(f) is the same as Clean Water Act section 309(c)(5) (33 U.S.C. section 1319(c)(5)), and must be interpreted consistent with federal law. For purposes of that provision, U.S. EPA defines “single operational upset” as

“an exceptional incident which causes simultaneous, unintentional, unknowing (not the result of a knowing act or omission), temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include . . . noncompliance to the extent caused by improperly designed or

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

inadequate treatment facilities.” (See U.S. EPA Guidance Interpreting “Single Operational Upset,” which is contained on the SWRCB website.)

This U.S. EPA Guidance further defines an “exceptional” incident as a “nonroutine malfunctioning of an otherwise generally compliant facility.” For example, if a facility has had a history of violations due to excess flows during wet weather events, the single operational upset provision may not apply to such violations.

A decision by the United States Court of Appeals for the Third Circuit further interprets the “single operational upset” provision. See *Public Interest Research Group of New Jersey, Inc. et al. v. Powell Duffryn Terminals Inc.* (3d Cir. 1990) 913 F.2d 64. The Court considered a “single operational upset” to mean such things as upsets caused by a sudden violent storm, a bursting tank, or other exceptional event, not operational upsets caused by improperly operated or designed facilities. The Court determined that the “single operational upset” provision applies to the determination of the amount of the liability or penalty; it is not a defense to liability. The “single operational upset” provision differs from the “upset” defense provided by U.S. EPA’s regulations in 40 CFR section 122.41(n). That “upset” defense may be raised as an affirmative defense to liability and the discharger must meet certain requirements, including reporting the incident within 24 hours.

Merely because more than one effluent limitation is violated does not mean that a “single operational upset” occurred. The discharger has the burden of demonstrating that a “single operational upset” occurred. The discharger must show that the violations were the result of a specific cause, and that the cause qualifies as an upset. See *Powell Duffryn*, 913 F.2d at 76; *U.S. v. Gulf States Steel, Inc.* (N.D. Ala. 1999) 54 F.Supp.2d 1233, 1248. For the purposes of determining the number of violations under section 13385(h) and (i), the Regional Boards should apply U.S. EPA’s Guidance in determining whether a “single operational upset” has occurred. Ultimately, this will be a fact-based determination by the State and Regional Boards.

If the State or Regional Board determines that a single operational upset event has occurred, all exceedances on any single day that are attributable to that event will be counted as only one exceedance for the purposes of calculating mandatory penalties. If the exceedances attributable to the same event continue for two days, two exceedances will be counted, and so on, in accordance with U.S. EPA’s Guidance.⁵ However, the “single operational upset” provision should not be used for subsequent days where the discharger fails to take immediate remedial steps and thereby allows the noncompliance to continue over an extended period. See *Gulf States Steel*, 54 F.Supp.2d at 1247.

⁵ The Answer to Question II.11 in the memorandum dated December 6, 1999 stated that exceedances that continued for multiple days would be counted as a single violation. This answer has been revised to be consistent with the U.S. EPA’s Guidance.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

37. Q. If the waste discharge requirements contain effluent limitations addressing both a daily maximum and a monthly average for the same pollutant, are exceedances of each based on the same monitoring event(s) counted as two separate violations for purposes of section 13385(h) or (i)?

A. Yes.

38. Q. In determining the number of violations for purposes of section 13385(h) or (i), should the State or Regional Board count one violation for each separate limitation regardless of the number of violations?

A. Unless multiple violations are the result of a single operational upset, each exceedance of separate effluent limitations should be considered a separate violation. However, a violation that fits into more than one subdivision of section 13385 should not be assessed a double penalty. For example, a serious violation under section 13385(h) would also be an exceedance of an effluent limitation under section 13385(i)(1), but penalties should not be assessed twice for the same violation. If the discharger had exceeded four effluent limitations in a period of six consecutive months, and the first and fourth violations were serious violations, the discharger would be assessed a mandatory minimum penalty of \$6,000, not \$9,000. The second serious violation is also the first violation subject to a mandatory minimum penalty under section 13385(i)(1), but the discharger would only be assessed once for that violation.

39. Q. How does the State or Regional Board determine how many “violations” occurred?

A. For purposes of the mandatory penalty provisions, the Regional Board should determine the number of violations based on monitoring data and other evidence that the discharger has exceeded an effluent limitation. For example, if based on one or more monitoring data points in a month, the Regional Board determines that the discharger has violated a monthly average effluent limitation, the Regional Board should consider that one violation. Note, however that if the Regional Board chooses to assess discretionary administrative civil liability for violations of a monthly average it should consider such a violation of a monthly average as 30 days of violations in order to be consistent with the Clean Water Act. The new section 13385(h) and (i) requires a mandatory penalty for “each violation,” not “for each day in which the violation occurs” as provided in section 13385(c). If the permit contains an effluent limitation based on a daily maximum, but only requires weekly monitoring, the Regional Board should consider each monitoring data point that exceeds the daily maximum as a violation unless other evidence indicates that a violation has occurred on more days than the day the monitoring data was collected.

40. Q. Does an exceedance of an average or median effluent limitation constitute one violation or multiple violations?

A. In the usual case, if the discharger exceeds an average or median effluent limitation based on a static period of time (e.g., monthly or weekly averages), it would be considered only

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

one violation for the month or the week for the purposes of calculating mandatory penalties, as described above. Exceedances of effluent limitations where it is specified that the average or median will be computed on a rolling basis (calculated daily), however, would be considered to be violations for each new time period that the average or median was exceeded. The permit, the applicable water quality control plan, and U.S. EPA guidance should be reviewed to determine how to calculate the number of violations in these cases.

41. Q. Is it possible to have more than one mandatory penalty per day for an exceedance of a single effluent limitation?

- A. For the purpose of mandatory penalties, an exceedance of a single effluent limitation based on instantaneous maximums or hourly averages should be counted as no more than one violation per day.

C. Potential Exceptions to Mandatory Penalties

42. Q. Do the mandatory minimum penalty provisions apply even if the Regional Board has issued a cease and desist order or other order providing a time schedule for achieving compliance with the effluent limitation that is the subject of the violations?

- A. Generally, yes. Issuance of the penalty and the amount of the penalty is mandatory even if there is a cease and desist order or other time schedule order outside of the permit, unless the cease and desist order or time schedule order meet the conditions specified in section 13385(j)(2) or (3), which are discussed below. If, however, the permit itself includes a time schedule before the effluent limitation is in effect, and/or provides for an interim limitation, an exceedance of the effluent limitation that is not yet in effect would not result in a violation subject to a mandatory penalty. If the permit itself includes interim effluent limitations, violations of those interim limitations would be subject to mandatory penalties. If a cease and desist order includes effluent limitations, violations of those effluent limitations would not be subject to mandatory penalties unless those limits are also in the permit. The Regional Board may also under some circumstances grant variances from effluent limitations; such variances would be contained in the permit and if they are effluent limitations, violations could be subject to the mandatory penalties.

43. Q. Are exceedances of effluent limitations that result from qualifying treatment plant bypasses or upsets subject to mandatory penalties?

- A. Generally, yes. The only exception, which is specified in section 13385(j)(1)(D), applies to treatment facilities located in Los Angeles County. Pursuant to 40 CFR section 122.41(m) and (n), a Regional Board may incorporate provisions for bypass and/or upset into its NPDES permits. (Note that the “upset” described in 40 CFR 122.41(n) is not the same as the “single operational upset” described above.) If the discharger’s permit contains these provisions, then for the purposes of assessing discretionary liability, violations of certain effluent limitations may be excused if the discharger can demonstrate

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

that the violations resulted from a qualifying bypass or upset condition. (Only technology based effluent limitation violations may be excused under the upset defense.) However, section 13385(h) and (i) require the assessment of mandatory penalties when a discharger “exceeds” effluent limitations. Even if the violation may be excused, the fact that the effluent limitation was “exceeded” remains. The operative term in the mandatory penalty provisions of section 13385 is “exceeds,” whereas the operative term in the discretionary liability provisions is “violates.” This difference in terms, in conjunction with the otherwise unnecessary exception for Los Angeles County facilities, means that exceedances of certain effluent limitations that result from qualifying treatment plant bypasses or upsets, while perhaps not subject to discretionary liability, are still subject to mandatory penalties.

44. Q. Are there any exceptions to the requirement to assess mandatory penalties due to circumstances that are beyond the control of the discharger?

- A. Yes. Section 13385(j)(1) states that mandatory penalties shall not be assessed if the violations are caused by one or any combination of (1) an act of war, (2) an unanticipated, grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight, or (3) an intentional act of a third party, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

45. Q. What additional exceptions to mandatory penalties took effect on January 1, 2001?

- A. SB 2165, which became effective on January 1, 2001, contained several new exceptions to the mandatory penalties of section 13385(h) and (i). section 13385(j)(1)(D) provides the exception for approved treatment plant bypasses during calendar year 2001 in the Los Angeles Region mentioned above. An uncodified section of SB 2165 provides relief from mandatory penalties for certain construction dewatering and storm water discharges during calendar years 2000 and 2001 in the Los Angeles Region. Section 13385(j)(2) and (j)(3) provide exceptions for discharges that are in compliance with a cease and desist order or section 13300 time schedule order under narrowly specified conditions. Finally, section 13385(k) authorizes the State or Regional Boards to require a publicly owned treatment works (POTW) that serves a small community to spend an amount equivalent to the mandatory penalty toward the completion of a compliance project in lieu of assessing the mandatory penalty.

46. Q. What are the conditions for qualifying for the new exception to mandatory penalties based on compliance with an existing cease and desist order or time schedule order pursuant to section 13385(j)(2)?

- A. SB 2165 added new section 13385(j)(2), which provides an exception to the mandatory penalties under the following conditions. The discharge must be in compliance with a cease and desist order (CDO) or a section 13300 time schedule order (TSO) that was issued between January 1, 1995, and July 1, 2000. The CDO or TSO must specify actions

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

to correct the violations that would otherwise be subject to mandatory penalties, and must include a final compliance date. If the final compliance date is more than one year from the effective date of the CDO or TSO, the CDO or TSO must contain interim tasks and a schedule for completing those interim tasks. In addition, the discharger must either be implementing a PPP, or be under a requirement of the Regional Board to implement a PPP. Finally, in order to qualify for the exception, the discharger must also demonstrate that it has carried out “all reasonable and immediately feasible actions to reduce noncompliance” with its NPDES permit, and the Executive Officer must concur with this demonstration.

The applicability of this exception expires in accordance with section 13385(j)(2)(B). The mandatory penalties shall apply to any continuing exceedances on the next date that NPDES permit is revised and reissued (usually within five years), unless the Regional Board does all of the following on or before the date of reissuance. First, the Regional Board must determine that the discharger is properly implementing a complete PPP. Second, the Regional Board must modify the CDO or TSO as necessary to make it consistent with the reissued NPDES permit. Third, the Regional Board must establish in the CDO or TSO a date for achieving full compliance with all of the terms of the reissued NPDES permit. The compliance date is subject to varying restrictions. If the reissued NPDES permit adds any new or more stringent effluent limitations than those contained in the previous permit, then the final compliance date may be no later than ten years from the date that the previous NPDES permit was issued. If the reissued NPDES permit does not add any new or more stringent effluent limitations, then the final compliance date may be no later than ten years from the date that the previous NPDES permit was issued or the original compliance date in the CDO or TSO, whichever is earlier. If the discharger fails to comply with the final compliance date (or any other provision of the CDO or TSO), any exceedances of effluent limitations during the period of noncompliance are subject to mandatory penalties.

47. Q. What are the conditions for qualifying for the new exception to mandatory penalties based on compliance with a new cease and desist order or time schedule order pursuant to section 13385(j)(3)?

- A. SB 2165 also added new section 13385(j)(3), which provides an exception to the mandatory penalties under the following conditions. The discharge must be in compliance with a CDO or TSO that was issued after July 1, 2000. The CDO or TSO must specify actions to correct the violations that would otherwise be subject to mandatory penalties, and must include a final compliance date that is as short as possible, taking into account specified factors, but may not exceed five years from the effective date of the CDO or TSO. If the final compliance date is more than one year from the effective date of the CDO or TSO, the CDO or TSO must contain interim effluent limitations, interim tasks, and a schedule for completing those interim tasks. In addition, the discharger must either be implementing a PPP, or be under a requirement of the Regional Board to implement a PPP.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

In addition to the above, in order to qualify for this exception, the Regional Board must find that the discharger is unable to consistently comply with its effluent limitation(s) for one of the following three reasons. First, the effluent limitation may be a “new, more stringent, or modified” requirement that became applicable to the discharge after an NPDES permit had already been issued for the facility, and after July 1, 2000, and new or modified control measures must be necessary to comply with the effluent limitation. The condition that the effluent limitation became applicable after the facility had already been issued an NPDES permit is intended to ensure that new facilities are not inadequately designed. The condition that the effluent limitation became applicable (e.g., through the renewal or reissuance of an existing NPDES permit) after July 1, 2000, ensures that older facilities that were already required to upgrade in order to comply with new effluent limitations prior to July 1, 2000 do not receive an exception to mandatory penalties under this provision. The new, more stringent, or modified effluent limitations could include, for example, new effluent limitations based on a recent reasonable potential analysis, the California Toxics Rule, or a new total maximum daily load. If there is a compliance schedule accompanying the new effluent limitation, of course, this exception from mandatory penalties would not be necessary until the effluent limitation takes effect.

Second, there may be new methods for detecting or measuring a pollutant that demonstrate that new or modified control measures are necessary to comply with the effluent limitation. This could include, for example, improved detection limits that indicate for the first time that a particular pollutant is in the discharge. Third, there may be an unanticipated change in the quality of the only municipal or industrial water supply reasonably available to the discharger that causes exceedances of effluent limitations. Finally, under all three of these scenarios, the Regional Board must find that new or modified control measures to address the exceedances caused by one of the above reasons cannot be put into operation within 30 calendar days. If the Regional Board intends the CDO or TSO to provide an exception to mandatory penalties, it is recommended that the Regional Board also include a finding to that effect.

48. Q. Do the exceptions to mandatory penalties based on compliance with a CDO or TSO apply to violations that occurred prior to January 1, 2001?

- A. No. The general rule is that statutes apply prospectively, unless there is clear legislative intent to the contrary. Here, there is no indication that the Legislature intended these exceptions to apply retroactively. Further, new section 13385(j)(2) and (3) cannot be said to be mere clarifications of the pre-existing mandatory penalty requirements. Rather, these provisions of SB 2165 created new circumstances under which the mandatory penalty provisions simply do not apply (“Subdivisions (h) and (i) do not apply to any of the following. . .”). Therefore, notwithstanding new section 13385(j)(2) and (3), the Regional Boards must assess mandatory penalties for any qualifying violations under section 13385(h) and (i) that occurred prior to January 1, 2001.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

49. Q. What are the conditions for the “small community” alternative to mandatory penalties?

- A. Section 13385(k) authorizes the State or Regional Boards to require a POTW that serves a small community to spend an amount equivalent to the mandatory penalty toward the completion of a compliance project in lieu of assessing the mandatory penalty against the POTW if the State or Regional Board finds that the compliance project is designed to correct the violations within five years, the compliance project is in accordance with the State Board’s Enforcement Policy, and the POTW has demonstrated sufficient funding to complete the compliance project.

50. Q. Which dischargers are eligible for the small community alternative to mandatory penalties? What is a “compliance project”?

- A. Only POTWs serving small communities are eligible for this alternative to mandatory penalties. Section 13385(k) incorporates the definition contained in section 79084(b) for Proposition 13’s Watershed Protection Program: “ ‘small community’ means a municipality with a population of 10,000 persons or less, a rural county, or a reasonably isolated and divisible segment of a larger municipality where the population of the segment is 10,000 persons or less, with a financial hardship as determined by the [state] board.” [The State Board has not yet defined “financial hardship” for these purposes. It is expected that the current revisions to the Enforcement Policy will contain such a definition.]

Section 13385(k) requires that the compliance project be “in accordance with the enforcement policy of the state board.” The existing Enforcement Policy does not address compliance projects. It is expected that the current revisions to the Enforcement Policy will describe appropriate types of compliance projects.

Until the expected revisions to the Enforcement Policy take effect, Regional Boards will not be able to utilize the small community alternative to mandatory penalties contained in section 13385(k).

51. Q. May the State and Regional Boards utilize the small community alternative to mandatory penalties for violations that occurred prior to January 1, 2001?

- A. Yes, provided that they have not already finally assessed the mandatory penalties for the same violations. Unlike the new exceptions to the mandatory penalties based on compliance with a CDO or TSO in section 13385(j)(2) and (3), which determine whether the mandatory penalty provisions apply to the violations (see Answer to Question 48), the new small community alternative in section 13385(k) provides an alternative to the State or Regional Board’s assessment of the mandatory penalty (“In lieu of assessing all or a portion of the mandatory minimum penalties pursuant to subdivisions (h) and (i). . . .”). As long as the assessment has not yet occurred, the utilization of the small community alternative to mandatory penalties for violations that occurred prior to the effective date of

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

SB 2165 should be considered a prospective application of this provision of the amendment.

52. Q. How often can a discharger perform a supplemental environmental project or develop a pollution prevention plan in lieu of paying a mandatory penalty?

- A. Under section 13385(h)(1) the State or Regional Board must assess a mandatory penalty for each serious violation. In lieu of the \$3,000 penalty, however, the State or Regional Board may allow the discharger to perform a supplemental environmental project (SEP) or develop a pollution prevention plan (PPP), as long as the discharger has had no serious violations during the previous six months. If the discharger commits any additional serious violations in the next 180 days, the Regional Board must assess a mandatory penalty for those additional violations, and may not substitute an SEP or a PPP for those mandatory penalties. Thus, the Regional Board must take an action for every serious violation. If the Regional Board allows the discharger to prepare an SEP or PPP for the first serious violation, it must wait 180 days before it can allow the discharger to prepare an SEP or PPP in lieu of the mandatory penalty for any subsequent serious violations. For example, if a discharger violates an effluent limitation that constitutes a serious violation in February, April, and June, it would be subject to \$9,000 in mandatory penalties. The Regional Board could only allow the discharger to conduct an SEP or develop a PPP for the violation in February in lieu of the penalty, i.e., for up to \$3,000. A discharger may not conduct an SEP or develop a PPP in lieu of paying mandatory penalties under section 13385(i).

53. Q. Are federal agencies that have NPDES permits subject to mandatory minimum penalties?

- A. No. The federal government is subject to state laws only to the extent it has waived sovereign immunity. The Clean Water Act section 313 waived sovereign immunity to the extent that the federal government

“shall be subject to, and comply with [State] requirements, administrative authority, process, and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. . . .”

The United States Supreme Court has determined that a waiver of sovereign immunity must be strictly interpreted, i.e., the waiver must be explicit. While Congress has waived sovereign immunity with respect to the issuance of and compliance with permitting requirements, courts have determined that it has not waived sovereign immunity with respect to the state’s assessment of penalties for past violations and punitive fines under the Clean Water Act. The term “sanctions” does not include punitive fines. See *U.S. Department of Energy v. Ohio*, 112 S.Ct. 1627 (1992), *State of Maine v. Dept. of the Navy*, 973 F.2d 1007 (1st Cir. 1992). The mandatory penalties under section 13385(h) and (i)

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

would apply to past violations and are intended to be punitive. Therefore, the federal government cannot be subject to mandatory penalties under section 13385.

D. Procedures Related to the Assessment of Mandatory Penalties

54. Q. Does the State or Regional Board assess mandatory minimum penalties?

- A. Section 13385 authorizes both the State Board and the Regional Boards to assess administrative civil liability and mandatory penalties. Typically, however, the Regional Board would initially assess the liability or penalties, but such assessments are subject to State Board review through the petition process.

55. Q. Who has the burden of proof, the State or Regional Board or the discharger, in determining whether the violation is subject to the mandatory minimum penalty?

- A. Violations under section 13385 are subject to strict liability and the mandatory penalty provisions do not change the liability scheme. Under strict liability, the State or Regional Board must prove that there have been violations as specified in section 13385(h) or (i). Once the State or Regional Board has demonstrated such violations, it becomes the discharger's burden to establish, by a preponderance of the evidence, that the amount of the penalty imposed should be less than the maximum. Since the new provisions establish statutory minimum penalties, the State or Regional Board may not assess a lesser amount. The State or Regional Board may determine at the hearing, however, that the evidence is not sufficient to make a finding that there was a violation. It is up to the discharger to provide evidence to demonstrate that the Regional Board incorrectly calculated the number of violations and the amount of the penalty. See *State of California v. City and County of San Francisco, et al.* (1979) 94 Cal.App.3d 522.

56. Q. What procedure should the Regional Board use in assessing the mandatory minimum penalty?

- A. To assess mandatory penalties under section 13385(h) or (i), the Executive Officer should issue a "Complaint for Mandatory Penalties" pursuant to the procedure in section 13323. If the Executive Officer chooses to seek discretionary civil liability that also includes violations subject to mandatory penalties, the Executive Officer would issue a "Complaint for Administrative Civil Liability and Mandatory Penalties." The State Board Office of Chief Counsel has prepared sample complaints. The Complaint should provide the discharger the opportunity to waive the right to a hearing and pay the stated penalty, to request a settlement meeting with the Executive Officer, or to request a hearing before the Regional Board to challenge the penalty. The Complaint should also inform the discharger that if a hearing before the Regional Board is requested, the Regional Board may modify the amount assessed by including additional discretionary liability based on section 13385. If it is likely that the Regional Board would want to consider assessing additional discretionary liability, the Complaint for Mandatory Penalties should also include an evaluation of the factors specified in section 13385(e), including a calculation

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

of economic benefit. Alternatively, the Regional Board could direct the Executive Officer to rescind the “Complaint for Mandatory Penalties” and issue a “Complaint for Administrative Civil Liability and Mandatory Penalties” at the hearing.

If the discharger chooses to waive the right to a hearing, the waiver must be accompanied by a check for the full amount assessed (less any supplemental environmental project approved pursuant to section 13385(h)). The waiver is not effective until the assessed amount has been paid.

The act does not specify when the mandatory penalties must be assessed. The Regional Board Executive Officers may issue complaints at suitable times to make best use of staff resources and to assure compliance with section 13323 hearing requirements.

57. Q. Can persons aggrieved by the assessment of mandatory penalties file a petition for review with the State Board under section 13320? If so, does the discharger have to pay the penalty while the petition is pending before the State Board?

- A. The discharger and other interested persons may petition the State Board to review the mandatory penalty. While the petition is pending, the discharger is not required to pay the penalty. The penalty is due and payable within 30 days after a decision upholding the penalty or dismissal of the petition.

58. Q. Must the Regional Board recover economic benefit in assessing a penalty under section 13385(h) or (i)?

- A. No. The requirement to recover economic benefit is included within section 13385(e), which only applies to assessing discretionary liability, not to recovering mandatory minimum penalties. If, however, a Regional Board is seeking both mandatory minimum penalties pursuant to section 13385(h) or (i) and administrative civil liability pursuant to section 13385(a) through (e), it must recover at a minimum the economic benefit, if any, or the mandatory penalty amount, whichever is greater.

59. Q. May the Regional Board assess administrative civil liability in addition to the mandatory penalty?

- A. Yes. Where the Regional Board is required to assess a mandatory minimum penalty, it may also choose to assess a greater amount under the discretionary liability provisions. In such a case, the Regional Board Executive Officer would issue a “Complaint for Administrative Civil Liability and Mandatory Penalties.” In any settlement of such a complaint, or after a hearing before the Regional Board, the Executive Officer or Regional Board must recover no less than the mandatory penalties or the economic benefit, whichever is greater.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

60. Q. Does the assessment of a mandatory penalty preclude later assessment of administrative civil liability pursuant to section 13385(a) through (e) for the same violation that was the subject of the mandatory penalty?

A. Yes. While the State or Regional Board may assess liability above the mandatory minimum penalty, once a penalty is assessed there can be no further assessment for the same violation unless new facts, such as concealment of evidence, come into play.

III. ECONOMIC BENEFIT (SECTION 13385(E))

61. Q. Section 13385(e) now requires the Regional Board, State Board, or superior court, in determining the amount of civil liability for violations of an NPDES permit to, at a minimum, recover the economic benefits, if any, derived from the acts that constitute the violation. How is the economic benefit to be calculated?

A. The draft revisions to the Enforcement Policy contain guidance for calculating economic benefit. In general, the Regional Board staff would determine what actions could have been taken to attain compliance or avoid violations and consider such information as what the costs of those actions would have been, the interest earned by delaying compliance, and what benefit to the discharger occurred as a result of failing to comply or delaying compliance. The Regional Board may request information from the discharger to use in determining the amount of economic benefit. The complaint for administrative civil liability should specify the basis for the economic benefit determination. It then becomes the discharger's burden to demonstrate that it had no or a lesser amount of economic benefit.

62. Q. Must the Regional Board assess the economic benefit to the extent it exceeds statutory maximum liability (i.e., the maximum \$10,000 per day per violation and \$10 per gallon)?

A. No. The requirement to recover economic benefit does not create a new statutory maximum liability. If the economic benefit exceeds the statutory maximum liability, the Regional Board shall recover the statutory maximum liability.

63. Q. If the Regional Board must assess a mandatory penalty under section 13385(h) or (i), but has determined that it is not appropriate to assess administrative civil liability, must the Regional Board also recover any economic benefit derived from the acts that constitute the violation(s)?

A. No. See Answer to Question 58. If the Regional Board chooses in its discretion to assess civil liability in addition to the mandatory penalty, however, then it is required to consider the factors in section 13385(e) and must recover the economic benefit, if any. In such a case, the total recovered amount must be no less than the mandatory penalty amount or the economic benefit, whichever is greater.

64. Q. In determining the economic benefit, may the Regional Board subtract from the economic benefit the amount the discharger spent in responding to the discharge that occurred as a result of the failure to take the action in advance that would have prevented the discharge?

A. No. [In accordance with current draft revisions to Enforcement Policy].

IV. EFFLUENT LIMITATIONS (SECTION 13263.6)

65. Q. Section 13263.6 requires the Regional Boards to include effluent limitations in waste discharge requirements for a POTW for all substances (1) that are reported in toxic chemical release data reports prepared pursuant to section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. section 11023), (2) that are indicated are discharged into the POTW, and (3) for which the State or Regional Board has established numeric water quality objectives, and where (4) the Regional Board determines that the discharge is or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to, an excursion above any numeric water quality objective. How does the new section 13263.6(a), which requires the Regional Board to include effluent limitations in certain situations, differ from existing federal NPDES regulations that require inclusion of numeric effluent limitations in NPDES permits under certain circumstances?

- A. U.S. EPA NPDES regulations require an NPDES permit to include a water quality based numeric effluent limitation for all pollutants or pollutant parameters that the Regional Board determines

“are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including state narrative criteria for water quality.” (40 CFR section 122.44(d)(1)(i).)

U.S. EPA NPDES regulations specify how to determine whether there is a reasonable potential and provides options for determining the appropriate numeric effluent limitations.

Section 13263.6 is less broad in certain ways than existing NPDES requirements. Like existing NPDES requirements, effluent limitations are required where the discharge is at a level that will cause, have the reasonable potential to cause or contribute to an excursion above an objective. Unlike existing NPDES requirements, section 13263.6 requires effluent limitations only where the discharge causes excursions above numeric water quality objectives, not narrative water quality standards. Also, section 13263.6 requires effluent limitations only for substances discharged to the POTW and reported in toxic chemical release data reports and where the State or Regional Board has established numeric water quality objectives. At the present time there are few numeric water quality objectives in the water quality control plans. If a constituent has or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard, e.g., any applicable State or Regional Board numeric water quality objectives, the Regional Board must include a numeric effluent limitation in the NPDES permit. Compliance with existing NPDES requirements would result in compliance with the new section 13263.6.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

Unlike existing federal requirements, section 13263.6(a) requires the State or Regional Boards to include effluent limitations only for water quality objectives adopted by the State or Regional Boards. U.S. EPA has adopted the “California Toxics Rule” (CTR) that established water quality criteria for toxic pollutants for California. Those criteria must be implemented by the State and Regional Boards, but they have not been adopted by the State or Regional Boards so they need not, at this time, be considered in determining the need for effluent limitations under section 13263.6(a). Section 13263.6 applies only to water quality objectives adopted by the State or Regional Boards. The Office of Chief Counsel has prepared model permit language.

66. Q. What is section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. Sec. 11023)?

- A. The Emergency Planning and Community Right to Know Act (EPCRA) is a federal law that establishes programs to provide the public with information about hazardous and toxic chemicals in their communities and establishes emergency planning and notification requirements to protect the public in the event of a release of extremely hazardous substances. EPCRA section 313 requires the owner and operator of certain facilities to complete a toxic chemical release form for listed toxic chemicals used on the facility in quantities exceeding certain thresholds established in EPCRA section 313. The form must be submitted to U.S. EPA and to the state Office of Emergency Response each year.

67. Q. How does the Regional Board determine which substances are included in the most recent toxic chemical release data reported pursuant to section 313 of the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. Sec. 11023)?

- A. The Regional Board may request the POTW to submit a report pursuant to section 13267 (or other means) to the Board specifying what substances have been included in the toxic chemical release reports that are discharged into the POTW. Since, however, effluent limitations are only required where the State or Regional Board has adopted numeric water quality objectives, the Regional Board would comply with section 13263.6 by adopting effluent limitations for excursions above the numeric water quality objectives. To assure compliance with this provision, the Regional Boards should require POTWs to report information provided in EPCRA section 313 reports. The Office of Chief Counsel has prepared a model letter for use by the Regional Boards.

68. Q. Does section 13263.6 apply to non-NPDES waste discharge requirements?

- A. Yes, section 13263.6 applies to both NPDES permits and non-NPDES waste discharge requirements for POTWs.

Therefore, when issuing waste discharge requirements to POTWs that discharge to land, the Regional Boards should conduct a reasonable potential analysis, and adopt effluent

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

limitations, if appropriate, for substances on the EPCRA section 313 report if the State or Regional Board has adopted numeric water quality objectives for ground water.

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

ATTACHMENT

Examples for calculating the amount of mandatory minimum penalties pursuant to Water Code section 13385(i)

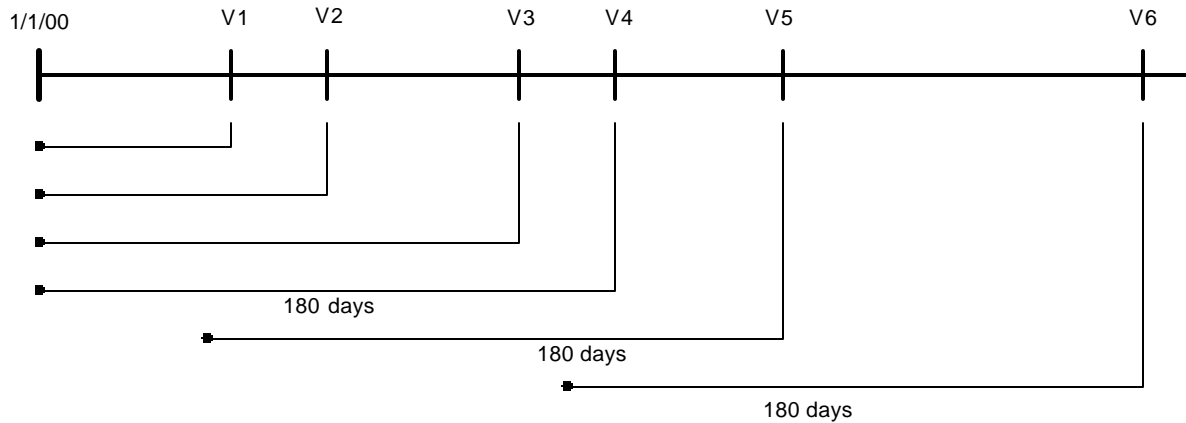
Notes:

V: an exceedance of an effluent limitation subject to 13385(i)(1)

S: an exceedance of an effluent limitation that also qualifies as “serious” under 13385(h)(1)

180 days: the 180-day period immediately preceding the “S” or “V” in question

Example #1



V1 = No MMP

V5 = \$3000

V2 = No MMP

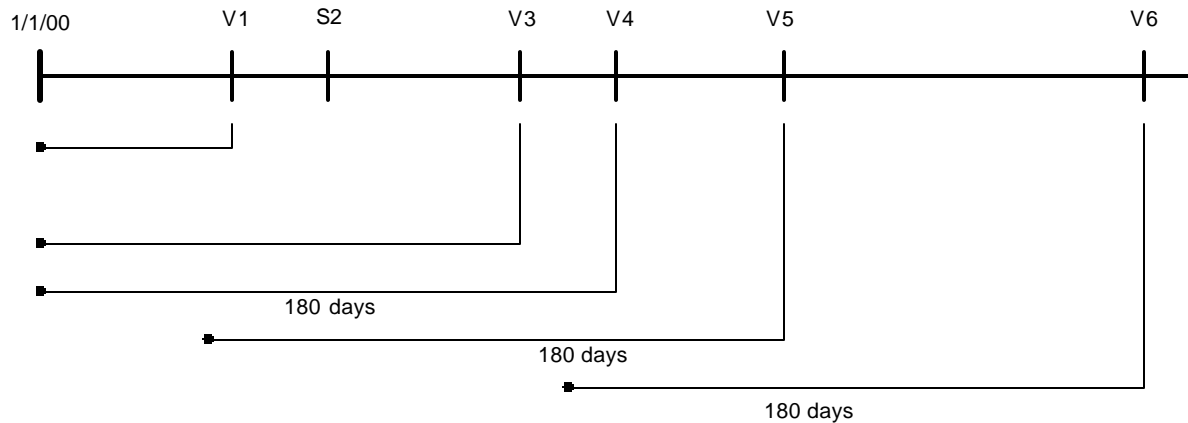
V6 = No MMP

V3 = No MMP

TOTAL = \$6000

V4 = \$3000

Example #2



V1 = No MMP

V5 = \$3000

S2 = \$3000

V6 = No MMP

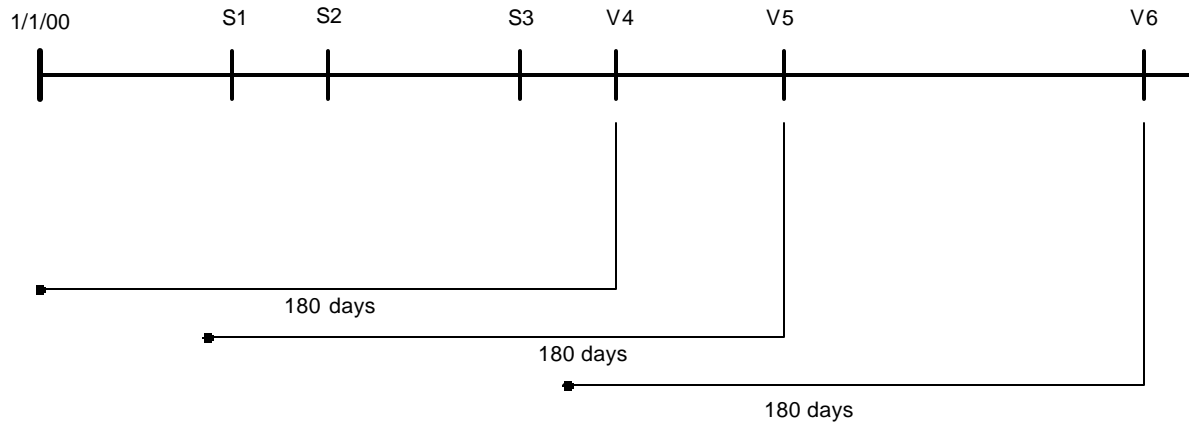
V3 = No MMP

TOTAL = \$9000

V4 = \$3000

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

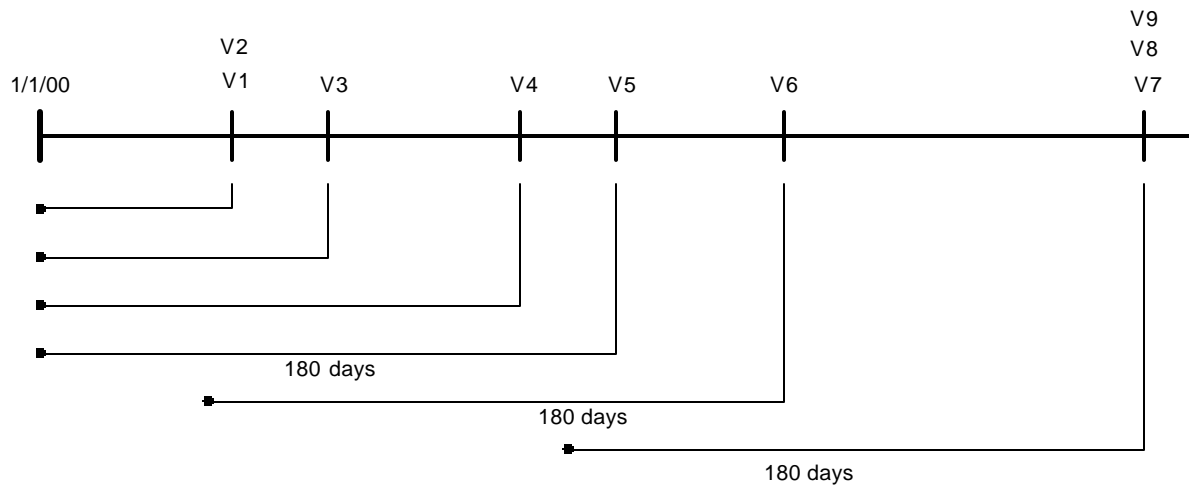
Example #3



S1 = \$3000
S2 = \$3000
S3 = \$3000
V4 = \$3000

V5 = \$3000
V6 = No MMP
TOTAL = \$15,000

Example #4

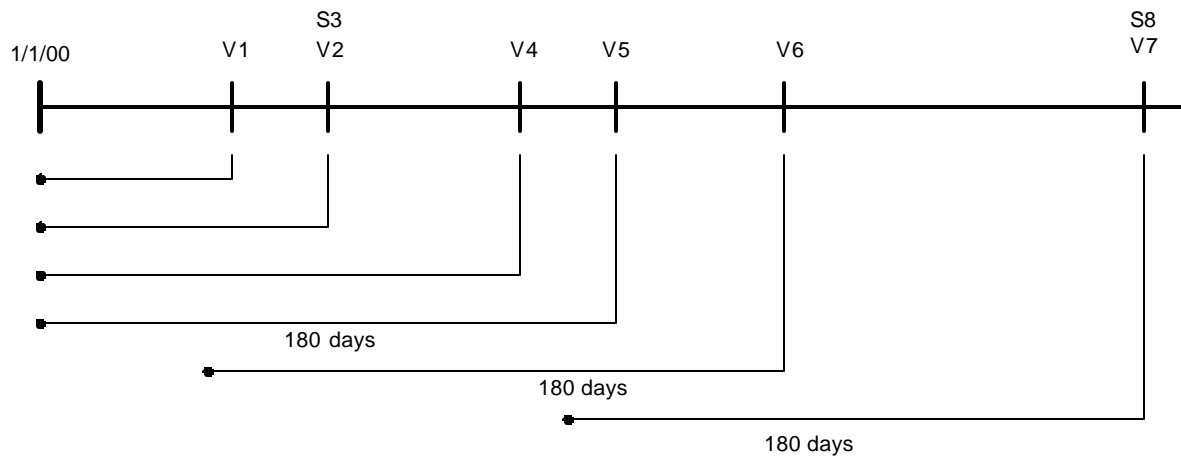


V1 = No MMP
V2 = No MMP
V3 = No MMP
V4 = \$3000
V5 = \$3000

V6 = \$3000
V7 = No MMP
V8 = \$3000
V9 = \$3000
TOTAL = \$15,000

SB 709 AND SB 2165 QUESTIONS AND ANSWERS

Example #5



V1 = No MMP

V2 = No MMP

S3 = \$3000

V4 = \$3000

V5 = \$3000

V6 = \$3000

V7 = No MMP

S8 = \$3000

TOTAL = \$15,000